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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TODD ALLEN BEVERLY,

Petitioner,

vs.

WARDEN JACK PALMER, *et al.*,

Respondents.

3:08-cv-00012-RCJ-VPC

ORDER

This action is a *pro se* petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. This matter comes before the Court on the merits of the petition.

I. Procedural History

Pursuant to a jury verdict, petitioner was found guilty of four counts of sexual assault with a minor under fourteen years of age, two counts of sexual assault with a minor under sixteen years of age, one count of attempted sexual assault, and one count of coercion. (Exhibit 31).¹ Petitioner was sentenced as follows: six terms of life with the possibility of parole after twenty years, one term of life with the possibility of parole after ten years, one term of five to twenty years, and one term of twelve to thirty months. (Exhibits 32 & 33). All terms are to be served concurrently. (*Id.*).

¹ The exhibits referenced in this order appear in the Court's record at ECF No. 13.

1 Petitioner was also sentenced to a special sentence of lifetime supervision. (*Id.*). The judgment of
2 conviction was entered on February 4, 2004. (Exhibit 33). Petitioner appealed his conviction.
3 (Exhibit 34). On July 12, 2005, petitioner filed an opening brief. (Exhibit 35). On February 16,
4 2006, the Nevada Supreme Court entered its order of affirmance and limited remand to correct
5 judgment of conviction (due to clerical error, referencing the conviction was pursuant to guilty plea
6 as opposed to a jury trial). (Exhibit 40). The amended judgment of conviction was filed April 10,
7 2006. Remittitur issued March 15, 2006. (Exhibit 41).

8 On January 16, 2007, petitioner filed a post-conviction habeas petition in state district court.
9 (Exhibit 43). On June 14, 2007, the state district court entered findings of fact, conclusions of law,
10 and order denying the post-conviction petition. (Exhibit 46). Petitioner appealed. (Exhibits 45 &
11 47). The Nevada Supreme Court entered its order of affirmance on October 31, 2007. (Exhibit 49).
12 Remittitur issued on November 28, 2007. (Exhibit 50).

13 Petitioner dispatched his federal habeas petition to this Court on December 12, 2007. (ECF
14 No. 3, at p. 1). The petition was filed on January 9, 2008. (ECF No. 3). Respondents filed an
15 answer on July 30, 2008. (ECF No. 15). Petitioner's reply was filed September 18, 2008. (ECF No.
16 20).

17 **II. Federal Habeas Corpus Standards**

18 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254(d),
19 provides the legal standard for the Court's consideration of this habeas petition:

20 An application for a writ of habeas corpus on behalf of a person
21 in custody pursuant to the judgment of a State court shall not be
22 granted with respect to any claim that was adjudicated on the merits in
State court proceedings unless the adjudication of the claim –

23 (1) resulted in a decision that was contrary to, or involved an
24 unreasonable application of, clearly established Federal law, as
25 determined by the Supreme Court of the United States; or
26

1 (2) resulted in a decision that was based on an unreasonable
2 determination of the facts in light of the evidence presented in the State
3 court proceeding.

4 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications
5 in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect
6 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court
7 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C.
8 § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme
9 Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from
10 a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme
11 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529
12 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

13 A state court decision is an unreasonable application of clearly established Supreme Court
14 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
15 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
16 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,
17 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more
18 than merely incorrect or erroneous; the state court’s application of clearly established federal law
19 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

20 In determining whether a state court decision is contrary to, or an unreasonable application of
21 federal law, this Court looks to the state courts’ last reasoned decision. *See Ylst v.*
22 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th
23 Cir. 2000), *cert. denied*, 534 U.S. 944 (2001). Moreover, “a determination of a factual issue made by
24 a State court shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting
25 the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).
26

1 III. Discussion

2 A. Ground One

3 Petitioner asserts that his trial counsel was ineffective for failing to file a pretrial motion to
4 suppress transcripts of interviews with the victim, the victim's mother, and petitioner conducted by a
5 detective of the Las Vegas Metropolitan Police Department. (ECF No. 3, at pp. 16-18).

6 Ineffective assistance of counsel claims are governed by the two-part test announced in
7 *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court held that a
8 petitioner claiming ineffective assistance of counsel has the burden of demonstrating that (1) the
9 attorney made errors so serious that he or she was not functioning as the "counsel" guaranteed by the
10 Sixth Amendment, and (2) that the deficient performance prejudiced the defense. *Williams v.*
11 *Taylor*, 529 U.S. 362, 390-391 (2000) (citing *Strickland*, 466 U.S. at 687). To establish
12 ineffectiveness, the defendant must show that counsel's representation fell below an objective
13 standard of reasonableness. *Id.* To establish prejudice, the defendant must show that there is a
14 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
15 would have been different. *Id.* A reasonable probability is "probability sufficient to undermine
16 confidence in the outcome." *Id.* Additionally, any review of the attorney's performance must be
17 "highly deferential" and must adopt counsel's perspective at the time of the challenged conduct, in
18 order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S. at 689. It is the petitioner's
19 burden to overcome the presumption that counsel's actions might be considered sound trial strategy.
20 *Id.*

21 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
22 performance of counsel resulting in prejudice, "with performance being measured against an
23 'objective standard of reasonableness,' . . . 'under prevailing professional norms.'" *Rompilla v.*
24 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
25 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary
26

1 to, or an unreasonable application of the *Strickland* standard. See *Yarborough v. Gentry*, 540 U.S. 1,
2 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of
3 reasonable professional assistance. *Id.*

4 On appeal from the denial of petitioner's state habeas petition, the Nevada Supreme Court
5 considered petitioner's claims that his trial counsel was ineffective for failing to file a pretrial motion
6 to suppress transcripts of interviews with the victim, the victim's mother, and petitioner conducted
7 by a detective of the Las Vegas Metropolitan Police Department, and rejected those claims:

8 Appellant failed to demonstrate that his trial counsel was ineffective in
9 relation to the victim's transcripts. This court previously determined
10 on direct appeal that the victim's transcripts are admissible. Therefore,
11 the underlying issue relating the to the victim's transcripts is governed
12 by the doctrine of the law of the case. Consequently, appellant failed
13 to demonstrate that trial counsel was ineffective for failing to file a
14 motion to suppress because appellant failed to show that a motion to
15 suppress the victim's transcripts would have been meritorious.
16 Therefore, the district court did not err in denying this claim.

17 Appellant also failed to demonstrate that his trial counsel was
18 ineffective for failing to file a motion to suppress the transcripts with
19 the victim's mother. Appellant failed to show that the motion to
20 suppress was meritorious and that there was a reasonable likelihood
21 that the exclusion of the evidence would have changed the result at
22 trial. Appellant provided no evidence that the State acted in bad faith
23 in destroying the audiotapes. In contrast, evidence adduced at trial
24 showed that the tapes were destroyed after the case went to the Justice
25 Court for a preliminary hearing because the computer system
26 erroneously showed that the case had been dismissed on the State's
motion, when it was actually dismissed because it went to the grand
jury. Detective Meegan further testified that it is standard procedure to
destroy evidence in cases that have been dismissed because there is no
reason to keep the evidence. Appellant also failed to demonstrate that
he was prejudiced by the admission of the victim's mother's transcript.
As noted above, the jury was aware that the audiotapes had been
destroyed. Although Detective Meegan testified that the transcripts
were accurate, the victim's mother testified that the transcripts did not
accurately reflect the statements she made during her interview with
Detective Meegan. The issue of veracity of the victim's mother's
transcripts was fully litigated at trial and the jury was presented with
the conflicting testimony at trial. Thus, appellant failed to demonstrate
that he was prejudiced by the admission of the evidence. Therefore,
appellant failed to demonstrate that trial counsel was ineffective on
this issue and the district court did not err in denying this claim.

1 Finally, appellant also failed to demonstrate how he was prejudiced by
2 the admission of the transcripts of his interview with Detective
3 Meegan, other than to attack the accuracy of the transcripts. Appellant
4 failed to elucidate how the admission of his transcript impacted the
5 jury's verdict in this case. Therefore, appellant failed to show that the
6 motion to suppress was meritorious and that there was a reasonable
7 likelihood that the exclusion of the evidence would have changed the
8 result at trial. Therefore, the district court did not err in denying this
9 claim.

10 (Exhibit 49, at pp. 3-5) (footnotes and citations omitted). The Nevada Supreme Court cited and
11 applied *Strickland v. Washington*, 466 U.S. 668 (1984), the correct federal standard for evaluating
12 ineffective assistance of counsel claims. The factual findings of the state court are presumed correct.
13 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's
14 ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as
15 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
16 determination of the facts in light of the evidence presented in the state court proceeding. The Court
17 will deny habeas relief with respect to the entirety to Ground One.

18 **B. Ground Two**

19 Petitioner alleges that trial counsel was ineffective "when she omitted critical exculpatory
20 evidence and potential defense exhibits." (ECF No. 3, at pp. 18-20). The Nevada Supreme Court
21 considered this claim and rejected it:

22 Second, appellant claimed that his trial counsel was ineffective for
23 failing to seek the admission of critical exculpatory evidence,
24 including potential defense exhibits. Many of these exhibits [are]
25 related to the victim's recantations and included: two letters that the
26 victim wrote to the district court judge, one letter that the victim wrote
to appellant, and a transcript of the interview with the victim
conducted by appellant's initial trial attorney Stanley Walton. The
victim's recantation was fully litigated at trial. Therefore, this
evidence was cumulative to that presented at trial. Appellant failed to
demonstrate that the presentation of this evidence would have altered
the outcome of his trial in light of the testimony regarding recantation
presented at trial. Therefore, appellant failed to demonstrate that trial
counsel was ineffective on this issue and the district court did not err in
denying this claim.

1 Appellant also claimed that trial counsel failed to present several
2 exhibits which were exculpatory. Appellant claimed that the following
3 exhibits were exculpatory: several school registration forms, several
4 tests indicating that the victim tested positive for Chlamydia and that
5 he had tested negative for HIV and Syphilis, a letter from appellant's
6 earlier trial counsel, Judge Jackie Glass, addressed to the State
7 discussing her intention to call his step-son at the Grand Jury, and
8 affidavits from appellant's son and step-son which contained evidence
cumulative to the testimony given at trial. A review of these exhibits
reveals that none of the exhibits demonstrate that appellant did not
commit the crimes for which he was convicted. Thus appellant failed
to demonstrate that the presentation of this evidence would have
altered the outcome of his trial. Therefore, appellant failed to
demonstrate that trial counsel was ineffective on this issue and the
district court did not err in denying this claim.

9 (Exhibit 49, at pp. 5-6) (footnotes and citations omitted). The Nevada Supreme Court applied
10 *Strickland v. Washington*, 466 U.S. 668 (1984), the correct federal standard for evaluating ineffective
11 assistance of counsel claims. The factual findings of the state court are presumed correct. 28 U.S.C.
12 § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was
13 contrary to, or involved an unreasonable application of, clearly established federal law, as
14 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
15 determination of the facts in light of the evidence presented in the state court proceeding. The Court
16 will deny habeas relief with respect to Ground Two.

17 C. Ground Three

18 Petitioner claims that trial counsel was ineffective for failing to "adequately investigate and
19 sufficiently prepare on defense issues." The only defense issue identified in the claim relates to an
20 assertion that the victim's testimony before the grand jury was given under "coercive duress."
21 Petitioner identified three individuals that he considered key to developing the defense: Jacklyn
22 Glass, Rolando Larraz, and Sharon Allen. Petitioner does not identify what evidence the three
23 witnesses would have provided. The claim acknowledges that trial counsel was aware of the
24 potential witnesses but determined "that they could not have added anything" and petitioner
25
26

1 disagreed with his counsel's opinion. (ECF No. 3, at pp. 20-21). The Nevada Supreme Court
2 considered these contentions as follows:

3 Third, appellant claimed that his trial counsel was ineffective for
4 failing to adequately investigate and prepare a defense because she
5 declined to present testimony from three potential witnesses: Jacklyn
6 Glass, Rolando Larraz, and Sharon Allen. Appellant argued that he
7 considered the testimony of these individuals key to the proper
8 development of his defense. However, appellant failed to elucidate
9 upon the specific testimony that these potential witnesses would have
10 offered at trial. As a result, appellant failed to demonstrate how trial
11 counsel's further investigation of these witnesses would have resulted
12 in a reasonable probability of a different outcome. Thus, appellant
13 failed to demonstrate that his trial counsel's performance was deficient
14 or that he was prejudiced. Therefore, the district court did not err in
15 denying this claim.

16 (Exhibit 49, at pp. 6-7) (footnotes and citations omitted). The Nevada Supreme Court applied
17 *Strickland v. Washington*, 466 U.S. 668 (1984), the correct federal standard for evaluating ineffective
18 assistance of counsel claims. The factual findings of the state court are presumed correct. 28 U.S.C.
19 § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was
20 contrary to, or involved an unreasonable application of, clearly established federal law, as
21 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
22 determination of the facts in light of the evidence presented in the state court proceeding. The Court
23 will deny habeas relief with respect to Ground Three.

24 D. Ground Four

25 Petitioner asserts that trial counsel was ineffective for failing to address "juror/witness issues
26 prejudicial to his case." Petitioner describes a single incident as "an altercation with the petitioner's
brother in the presence of jurors" with a "victim/witness advocate." The same "victim/witness
advocate" is alleged to have inappropriately discussed testimony with other witnesses. (ECF No. 3,
at pp. 22-24). The Nevada Supreme Court considered and rejected this claim:

Fourth, appellant claimed that his trial counsel was ineffective for
failing to address issues regarding the jury and witnesses that were
prejudicial to his case. First, appellant argues the trial counsel was

1 ineffective for failing to raise issues about problems with the recess
 2 area outside Department 6, where his trial was held. Appellant
 3 contended that the victim/witness advocate approached his brother
 4 outside the courtroom and began making "accusations of unethical
 5 behavior." Appellant also contended that the victim/witness advocate
 6 was going in and out of the courtroom during the trial and
 7 inappropriately discussing testimony with other witnesses. Appellant
 8 claimed that his trial counsel was unaware of these occurrences and
 9 did nothing to address them. However, appellant failed to present any
 10 evidence that the witnesses involved in this case were biased by these
 11 alleged events, and appellant failed to show how these alleged events
 12 impacted the jury's verdict in this case. Thus, appellant failed to
 13 demonstrate prejudice. Therefore, the district court did not err in
 14 denying this claim.

9 (Exhibit 49, at p. 7) (footnotes and citations omitted). The Nevada Supreme Court applied
 10 *Strickland v. Washington*, 466 U.S. 668 (1984), the correct federal standard for evaluating ineffective
 11 assistance of counsel claims. The factual findings of the state court are presumed correct. 28 U.S.C.
 12 § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling was
 13 contrary to, or involved an unreasonable application of, clearly established federal law, as
 14 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
 15 determination of the facts in light of the evidence presented in the state court proceeding. The Court
 16 will deny habeas relief with respect to Ground Four.

17 **E. Ground Five**

18 Petitioner claims that appellate counsel was ineffective for failing to raise various issues on
 19 direct appeal. (ECF No. 3, at pp. 24-25). The *Strickland* standard applies to challenges of effective
 20 appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Appellate counsel has no
 21 constitutional duty to raise every non-frivolous issue requested by the client. *Jones v. Barnes*, 463
 22 U.S. 745, 751-54 (1983). The Nevada Supreme Court considered each of petitioner's claims of
 23 ineffective assistance of appellate counsel and denied relief:

24 First, appellant claimed that his appellate counsel should have
 25 presented issues regarding a juror that fell asleep during trial.
 26 Appellant failed to demonstrate that the issue had a reasonable
 probability of success on appeal. During the trial, the district court

1 stopped testimony, very briefly, and asked a juror if he was alright.
2 The juror replied that he was fine and that the artificial lights bothered
3 his eyes. The district court then verified that the juror was just keeping
4 his head down to avoid the lights but was paying full attention to the
5 trial. The district court then instructed the juror to inform the court if
6 he was feeling tired and the juror reiterated that it was just that the
7 light hurt his eyes. Appellant has presented no evidence demonstrating
8 that this juror was in fact asleep or that the trial court proceedings were
9 impacted by this event. Therefore, the district court did not err in
10 denying this claim.

11 Second, appellant claimed that his appellate counsel was ineffective
12 for failing to address issues concerning juror Judith Draper's
13 conversation with appellant's bail bondsman. Appellant failed to
14 demonstrate that this issue had a reasonable probability of success on
15 appeal. During trial, Judith Draper had a brief conversation with
16 appellant's bail bondsman, who was apparently a person with whom
17 she bowled. After this conversation, Draper wrote a letter to the
18 district court informing the court of this communication. The district
19 court held a hearing outside the presence of the jury, with both the
20 state and defense counsel present, to determine the nature of the
21 conversation. During this hearing, Draper told the court that she had
22 discussed the case with appellant's bail bondsman who had informed
23 her that appellant had posted bail and that a German woman put up the
24 money for appellant's bail. After the bail bondsman made this
25 statement, Draper informed the bail bondsman that it was improper for
26 them to discuss the case further. Appellant provided no evidence that
Draper's conversation with appellant's bail bondsman impacted the
jury's verdict in his case. Therefore, the district court did not err in
denying this claim.

Third, appellant claimed that his appellate counsel was ineffective for
failing to investigate and present issues relating to post-trial comments
made to trial counsel. Appellant failed to explain what post-trial
comments were made to his trial counsel, and by whom, and how
further investigation of these documents would have impacted his
appeal. As a result, the district court did not err in denying this claim
as appellant failed to demonstrate that this issue would have a
reasonable probability of success on appeal.

Fourth, appellant claimed that his appellate counsel was ineffective for
failing to argue prosecutorial misconduct premised upon improper
comments made during trial and during closing arguments.
Specifically, appellant contended that appellate counsel should have
investigated and presented issues relating to the following comment by
the prosecution: "[A.M.] said to you under oath: that was meaningless
(it didn't happen and I lied when I said it did). Mom's testimony in
this court before this jury, same thing." Appellant failed to
demonstrate that this issue regarding the prosecutor's argument had a
reasonable probability of success on appeal. On direct appeal,

1 appellant argued prosecutorial misconduct because the prosecutor lied
2 to the victim, held the victim hostage to get her to testify before the
3 grand jury, and intimidated the victim into testifying that her initial
4 accusations were true. Appellant also argued that it was improper for
5 the State to grant the victim immunity from prosecution and then point
6 out that because of the immunity, the victim was not constrained to tell
7 the truth. This court rejected all of these arguments. Appellant failed
8 to demonstrate that any further argument of prosecutorial misconduct
9 would have had a reasonable probability of a different result.
10 Therefore, the district court did not err in denying this claim.

11 (Exhibit 49, at pp. 8-11) (footnotes and citations omitted). The Nevada Supreme Court applied
12 *Jones v. Barnes*, 463 U.S. 745, 751 (1983), the correct federal standard for evaluating ineffective
13 assistance of appellate counsel claims. The factual findings of the state court are presumed correct.
14 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's
15 ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as
16 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
17 determination of the facts in light of the evidence presented in the state court proceeding. The Court
18 will deny habeas relief with respect to Ground Five.

19 **F. Procedural Default of Grounds Six through Nine**

20 In Ground Six, petitioner alleges that he was "subjected to a selective/vindictive prosecutorial
21 process before and during trial, thus denying his rights to due process, fair trial, and equal
22 protection." (ECF No. 6, at pp. 26-28). In Ground Seven, petitioner asserts that his conviction was
23 based on a guilty verdict on all counts by a jury that was fundamentally biased, denying his rights to
24 due process, a fair trial, and equal protection. (ECF No. 6, at pp. 28-29). In Ground Eight, petitioner
25 alleges that this conviction was attained by the "prosecutor's misstatement of facts" and "the use of
26 fundamentally unfair means of impeaching petitioner's credibility," thereby violating his rights to
due process, and fair trial, and equal protection. (ECF No. 6, at pp. 29-31). In Ground Nine,
petitioner claims that he was "prejudiced before and during trial because of the events that transpired
during a 5 and ½ month pre-indictment delay, thus denying his rights to due process, fair trial, and
equal protection." (ECF No. 6, at pp. 31-32).

1. Procedural Default Principles

Generally, in order for a federal court to review a habeas corpus claim, the claim must be both exhausted and not procedurally barred. *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003). A federal court will not review a claim for habeas corpus relief if the decision of the state court regarding that claim rested on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

The *Coleman* Court stated the effect of a procedural default, as follows: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural default doctrine ensures that the state's interest in correcting its own mistakes is respected in all federal habeas cases. See *Koerner*, 328 F.3d at 1046.

2. Grounds Six through Nine Were Procedurally Defaulted in State Court on Independent and Adequate State Grounds

Grounds Six through Nine of the federal petition correspond to Grounds Six through Nine of petitioner's state habeas petition. (Exhibit 43, at pp. 30-36). Citing NRS 34.810(1)(b) and case law, the Nevada Supreme Court held that the claims asserted in Grounds Six through Nine should have been raised on direct appeal. (Exhibit 49, at pp. 12-13). The Nevada Supreme Court found those claims to be procedurally barred and that petitioner failed to demonstrate good cause to excuse the procedural default. (*Id.*).

The Ninth Circuit Court of Appeals has held that, at least in non-capital cases, application of the procedural bar at issue in this case -- NRS 34.810 -- is an independent and adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003) (holding that the procedural bar of NRS 34.810 is adequate state ground to bar federal review in non-capital cases); see also *Bargas v. Burns*,

1 179 F.3d 1207, 1210-12 (9th Cir. 1999) ("Thus, Nevada follows a strict rule: A petitioner must raise
 2 all claims in his first habeas petition in order to avoid the penalty of procedural default."), *cert.*
 3 *denied*, 529 U.S. 1073 (2000); *see also Petrocelli v. Angelone*, 248 F.3d 877, 886 (9th Cir. 2001)
 4 (distinguishing capital and non-capital cases); *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002)
 5 (same); cf. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 536 (2001). Grounds Six through
 6 Nine of the federal petition were procedurally defaulted on independent and adequate state law
 7 grounds.

8 3. Cause and Prejudice Analysis

9 To overcome a procedural default, a petitioner must establish either (1) "cause for the default
 10 and prejudice attributable thereto," or (2) "that failure to consider [his defaulted] claim[s] will result
 11 in a fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 262 (1989) (citations
 12 omitted). Petitioner also must show prejudice to excuse the procedural default. The prejudice that is
 13 required as part of the showing of cause and prejudice to overcome a procedural default is "actual
 14 harm resulting from the alleged error." *Vickers v. Stewart*, 144 F.3d 613, 617 (1998); *Magby v.*
 15 *Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984).

16 "Cause" to excuse a procedural default exists if a petitioner can demonstrate that some
 17 objective factor external to the defense impeded the petitioner's efforts to comply with the state
 18 procedural rule. *Coleman v. Thompson*, 501 U.S. at 755; *Murray v. Carrier*, 477 U.S. at 488;
 19 *Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998). Ineffective assistance of counsel may satisfy
 20 the cause requirement to overcome a procedural default. *Murray*, 477 U.S. at 488. However, for
 21 ineffective assistance of counsel to satisfy the cause requirement, the independent claim of
 22 ineffective assistance of counsel, itself, must first be presented to the state courts. *Murray*, 477 U.S.
 23 at 488-89. In addition, the independent ineffective assistance of counsel claim cannot serve as cause
 24 if that claim is procedurally defaulted. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

25 With respect to the prejudice prong of cause and prejudice, the petitioner bears:
 26

1 which raises a sufficient doubt as "to undermine confidence in the result of the trial." *Schlup v.*
2 *Delo*, 513 U.S. at 324.

3 In the instant case, petitioner does not argue actual innocence to excuse his procedural default
4 of Grounds Six through Nine in state court. Petitioner does, however, present a claim of "actual
5 innocence" as Ground Ten of the federal petition. (ECF No. 6, at p. 33). As discussed below,
6 petitioner has failed to make a showing of actual innocence. As such, petitioner cannot avoid the
7 application of the procedural default doctrine, because he has not shown that a "fundamental
8 miscarriage of justice" will occur if Grounds Six through Nine are barred from consideration.

9 **G. Actual Innocence/Ground Ten**

10 In Ground Ten, petitioner asserts that he is actually innocent of the crimes of which he was
11 convicted. (ECF No. 3, at pp. 33-44). In considering petitioner's claim of actual innocence, the
12 Nevada Supreme Court ruled as follows:

13 Appellant further claimed that new evidence demonstrated that he was
14 actually innocent of the crimes for which he was convicted. To
15 support his claim of actual innocence, appellant presented a letter
16 written by the victim and addressed to Judge Jeffrey Sobel recanting
17 her accusations of sexual assault, evidence relating to an interview
18 conducted by his former trial attorney Stanley Walton, wherein the
19 victim recanted her testimony and named her previous step-father as
20 the person who sexually assaulted her, various school registration
21 forms identifying both her previous step-father and appellant as to the
22 victim's emergency contact, and affidavits from appellant's son and
23 step-son.

24 "[A]ctual innocence means factual innocence, not mere legal
25 insufficiency. To demonstrate actual innocence, appellant would have
26 to establish that "it is more likely than not that no reasonable juror
would have convicted him."

Appellant failed to demonstrate actual innocence. First, appellant
failed to present any exculpatory evidence which would make it more
likely than not that no reasonable juror would have convicted him.
The victim's recantation was fully litigated at trial. The additional
evidence does not demonstrate appellant's factual innocence.
Moreover, appellant failed to demonstrate that any of the remaining
evidence was new or not reasonably available at trial. Therefore, the
district court did not err in denying this claim.

(Exhibit 49, at pp. 11-12) (footnotes and citations omitted). The Nevada Supreme Court cited and applied *Bousley v. United States*, 523 U.S. 614, 623 (1998) and *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995), the correct federal standards for evaluating claims of actual innocence. In the federal petition, as in the state petition, petitioner has failed to make a showing of “actual innocence” by presenting the court with new evidence which raises a sufficient doubt as “to undermine confidence in the result of the trial.” *Schlup v. Delo*, 513 U.S. at 324. The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court’s ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The Court will deny habeas relief with respect to Ground Ten.

H. Ground Eleven

Petitioner asserts a claim challenging the sufficiency of the evidence to support his conviction. (ECF No. 3, at pp. 45-47). When a habeas petitioner challenges the sufficiency of evidence to support his conviction, the court reviews the record to determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000). The court must assume that the jury resolved any evidentiary conflicts in favor of the prosecution, and the court must defer to that resolution. *Jackson*, 443 U.S. at 326; *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000) (*en banc*). The credibility of witnesses is beyond the scope of the court’s review of the sufficiency of the evidence. See *Schlup v. Delo*, 513 U.S. 298, 330 (1995). Under the *Jackson* standard, the prosecution has no obligation to rule out every hypothesis except guilt. *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion); *Jackson*, 443 U.S. at 326; *Schell*, 218 F.3d at 1023. *Jackson* presents “a high standard” to habeas petitioners claiming insufficiency of evidence. *Jones v. Wood*,

1 207 F.3d 557, 563 (9th Cir. 2000). The Nevada Supreme Court addressed the claim of insufficiency
2 of the evidence in ruling on petitioner's direct appeal, as follows:

3 Beverly first contends that the evidence presented at trial was
4 insufficient to support the jury's finding of guilt. Our review of the
5 record on appeal, however, reveals sufficient evidence to establish
6 guilt beyond a reasonable doubt as determined by a rational trier of
7 fact.

8 In particular, we note that the victim reported that Beverly sexually
9 abused her from the time she was in second grade until she was 16
10 years old. In her initial police interview with a detective, and her
11 interview with the prosecutor prior to the preliminary hearing, she
12 enumerated at least eight instances when Beverly sexually assaulted
13 her. The victim's accounts were detailed and in re-telling them, the
14 details were never inconsistent. Two expert witnesses testified that it
15 was not uncommon for child sexual abuse victims to recant. In this
16 case, the victim recanted after she learned that her mother was going to
17 be charged with child abuse or neglect for failing to report the alleged
18 abuse.

19 The jury was fully informed as to the circumstances of the victim's
20 initial accusations and her subsequent recantations. It is for the jury to
21 determine the weight and credibility to give conflicting testimony, and
22 we conclude that the jury could reasonably infer from the evidence
23 presented that Beverly committed the crimes charged.

24 Moreover, inconsistencies in the victim's testimony are not a basis for
25 reversal, as "[i]t was the jury function to resolve these matters and the
26 manner in which it did so and the weight it gave to the evidence will
not be questioned on appeal."

(Exhibit 40, at pp. 1-2) (footnotes and citations omitted). This Court has reviewed the relevant
portions of the record and finds that the Nevada Supreme Court applied the correct standard to the
facts of the case and was reasonable in its decision to sustain petitioner's convictions. As here,
where the record supports conflicting inferences, on sufficiency review, the court must presume that
the trier of fact resolved any such conflicts in favor of the prosecution and must defer to the jury's
resolution. *McMillan v. Gomez*, 19 F.3d 465, 469 (9th Cir. 1994) (citing *Jackson v. Virginia*, 443
U.S. 307, 326 (1979)). Moreover, the factual findings of the state court are presumed correct. 28
U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the state court's ruling
was contrary to, or involved an unreasonable application of, clearly established federal law, as

1 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
2 determination of the facts in light of the evidence presented in the state court proceeding. This Court
3 will deny habeas relief as to Ground Eleven.

4 **I. Ground Twelve**

5 Petitioner alleges constitutional violations challenging the admission of the statements of
6 April Miller-Gonzales by claiming that the destruction of the tape recordings of such statements
7 required suppression of the evidence. Petitioner asserts that the destruction of the tape recording was
8 in bad faith and was a violation of due process. (ECF No. 3, at pp. 47-50).

9 Petitioner raised this issue on direct appeal. The Nevada Supreme Court found petitioner's
10 claim to be without merit and held:

11 Beverly next contends that the district court erred by admitting the
12 transcript of the statement made by the victim to Detective Meegan
13 because the audiotape of the statement had been destroyed. A
14 conviction may be reversed when the state loses evidence if the
15 defendant is prejudiced by the loss or the state acted in bad faith in
16 losing it. In this case, there is no evidence that the State acted in bad
17 faith, and Beverly had failed to demonstrate that the loss of the original
18 tape was prejudicial. Detective Meegan testified that she reviewed the
19 transcript before the tape was destroyed and that any blanks in the
20 transcripts were the result of portions of the tape being inaudible.
21 Beverly fails to show that the tape would have been exculpatory or
22 material to his defense.

23 (Exhibit 40, at pp. 3-4) (footnotes and citations omitted). The factual findings of the state court are
24 presumed correct. 28 U.S.C. § 2254(e)(1). Moreover, the Nevada Supreme Court's findings are
25 supported by the trial court record. At trial, Detective Meegan described the circumstances that
26 resulted in the destruction of the tape recording of April Miller's statements. (Exhibit 27, at p. 191).
The tapes were destroyed after the case went to the justice court for preliminary hearing, because the
computer system erroneously showed that the case had been dismissed on the State's motion, when
in actuality, it was dismissed because it went to the grand jury. Detective Meegan testified that it
was standard procedure to destroy evidence in cases that were dismissed. (*Id.*). The Nevada
Supreme Court, on review of the trial transcripts, came to this same conclusion on review of the

1 appeal from the denial of petitioner's state habeas petition. (Exhibit 49, at p. 4). Petitioner has
2 failed to meet his burden of proving that the state court's ruling was contrary to, or involved an
3 unreasonable application of, clearly established federal law, as determined by the United States
4 Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of
5 the evidence presented in the state court proceeding. The Court will deny habeas relief with respect
6 to Ground Twelve.

7 **J. Ground Thirteen**

8 Petitioner claims prosecutorial misconduct, alleging that the prosecutor lied to the victim,
9 held her hostage to coerce her to testify before the grand jury, and intimidated her into testifying that
10 her initial accusations were true. (ECF No. 3, at pp. 50-54). The Nevada Supreme Court considered
11 this argument and found no credible evidence in the record to support such allegations. (Exhibit 40,
12 at p. 4). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1).
13 Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or
14 involved an unreasonable application of, clearly established federal law, as determined by the United
15 States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in
16 light of the evidence presented in the state court proceeding. The Court will deny habeas relief with
17 respect to Ground Thirteen.

18 **IV. Certificate of Appealability**

19 In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28
20 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
21 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
22 petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a
23 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
24 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's
25 assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In
26

1 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
2 debatable among jurists of reason; that a court could resolve the issues differently; or that the
3 questions are adequate to deserve encouragement to proceed further. *Id.* This Court has considered
4 the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a
5 certificate of appealability, and determines that none meet that standard. The Court will therefore
6 deny petitioner a certificate of appealability.

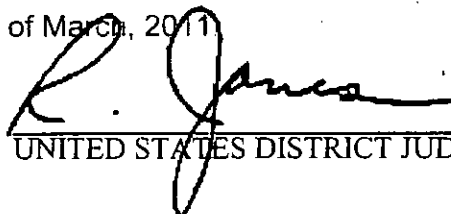
7 **V. Conclusion**

8 **IT IS THEREFORE ORDERED** that the petition for a writ of habeas corpus is **DENIED**
9 **IN ITS ENTIRETY.**

10 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
11 **APPEALABILITY.**

12 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
13 **ACCORDINGLY.**

14 Dated this 18th day of March, 2011.

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16 UNITED STATES DISTRICT JUDGE
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